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No. 80-1305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALFRED L. SNAPP & SON, INC., *et al., Petitioners,*

v.

COMMONWEALTH OF PUERTO RICO
on the relation of PEDRO BAREZ,
SECRETARY, DEPARTMENT OF LABOR AND
HUMAN RESOURCES, *Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 4, 1981

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The Respondent Commonwealth of Puerto Rico respectfully prays that the Court deny the requested writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 9, 1980.

QUESTION PRESENTED

May the Commonwealth of Puerto Rico sue as *parens patriae* for declaratory and injunctive relief against the violation by Virginia apple growers of a pervasive federal statutory and regulatory scheme which mandates that available domestic workers be given preference over foreign labor in temporary agricultural employment where: (1) the Commonwealth, which in 1978 suffered from 23% rural unemployment, has attempted since 1975 to place its unemployed farm workers in apple picking jobs with the petitioner growers; (2) the petitioners continue to accord preference to Jamaican workers over Puerto Rican workers; (3) the petitioners have engaged in coordinated, industry-wide resistance to the employment of Puerto Rican workers in apple picking jobs; and (4) only the Commonwealth is capable of securing comprehensive relief.

PARTIES TO THE PROCEEDING BELOW

Respondent concurs in the statement of parties to the proceeding contained in the Petition for Writ of Certiorari. However, the Honorable Pedro Barez has succeeded the Honorable Carlos Quiros as Secretary of the Department of Labor and Human Resources, upon whose relation this action has been brought.

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DECISIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Respondent is satisfied with these sections as they appear in the Petition for Writ of Certiorari at pp. 1-2.

STATEMENT OF THE CASE

This litigation is but one chapter in a controversy over the hiring of Puerto Rican agricultural workers for the annual apple harvest in East Coast states. At the heart of the controversy is the federally guaranteed right

of Puerto Ricans, as U.S. citizens, to a preference over alien labor in the competition for temporary agricultural work.

The Immigration and Nationality Act of 1952, 8 U.S.C. §§1101 *et seq.* ("INA"), permits the admission of aliens for the purpose of performing temporary agricultural work only "if unemployed persons capable of performing such service or labor cannot be found in this country. . . ." 8 U.S.C. §1101(a)(15)(H)(ii). The policy of Congress, as expressed in the INA, is that U.S. workers rather than aliens be employed wherever possible. *See, e.g., Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493, 500 (1st Cir. 1974). Pursuant to this policy, Immigration and Naturalization Service ("INS") regulations require that an employer's petition for the admission of nonimmigrant aliens be accompanied by a certification from the U.S. Secretary of Labor that U.S. workers are not available to do the work. 8 C.F.R. §214.2(h)(3).

The Secretary of Labor tests the availability of domestic workers by transmitting employers' job offers through the Interstate Clearance System ("ICS"), a network originally established by the Wagner-Peyser Act of 1933, 29 U.S.C. §§49-49k, to facilitate the flow of laborers from supply states to demand states during the Great Depression. The Puerto Rico Employment Service, an agency of the Commonwealth Department of Labor ("PRDOL"), has long been an active participant in the ICS.

The Commonwealth Government, alarmed at the rising level of unemployment in Puerto Rico, has attempted since 1975 to refer unemployed agricultural workers through the ICS to East Coast orchards for

work in the apple harvest. Second Amended Complaint (hereinafter "Complaint"), par. 61. Each year, concerted grower resistance to Puerto Rican workers has rendered these efforts largely unsuccessful. In 1976, despite extensive negotiations between representatives of East Coast growers and PRDOL which resulted in an agreement to hire 1000 Puerto Rican workers, the growers hired only 613 workers and dismissed the majority of these almost immediately for alleged unproductivity. In 1977, the growers refused to negotiate at all with PRDOL. Only 93 Puerto Rican workers found jobs in the apple harvest, and the majority of these were also dismissed within a short period of time for alleged unproductivity. Complaint, par. 61.

In all three years — 1975, 1976 and 1977 — the growers relied chiefly on the existence of Puerto Rico Public Law 87 ("P.L. 87"), 29 L.P.R.A. §§526 *et seq.* (1966), as amended, to justify their resistance to hiring Puerto Rican workers. This law, enacted originally in 1947 for the purpose of protecting Puerto Rican migrant farm workers employed off-island, requires mainland employers to negotiate a contract for the services of these workers. The apple growers objected to various mandatory contract conditions — such as health insurance benefits and three hot meals a day — as "onerous" and "burdensome," and took the position that Puerto Rican workers who insisted on benefits beyond the minimum federal conditions were not "available" U.S. workers within the meaning of the INA. This position was upheld in subsequent litigation. *Galan* v. *Dunlop*, 411 F.Supp. 268 (D.D.C. 1975), *appeals dismissed and remanded* 511 F.2d 467 (D.C. Cir. 1977) (unpublished); *Hernandez Flecha* v. *Quiros*, 567 F.2d 1154 (1st Cir. 1977), *cert. denied sub nom. Hernandez Flecha* v. *Marshall*, 436 U.S. 945 (1978).

Following the *Hernandez Flecha* decision, the legislature of Puerto Rico recognized that P.L. 87 was not serving its intended purpose to advance the interests of Puerto Rican workers, but was instead being used to bar their employment in the annual East Coast apple harvest. Accordingly, in July of 1978 the legislature passed an amendment to P.L. 87 which was specifically intended to remove this barrier. The amendment authorized the Commonwealth Secretary of Labor to exempt prospective employers from the requirement of negotiating a contract for the services of the workers if the employers' job offers complied with federal requirements.[1] In the preamble to this amendment, the Commonwealth legislature declared:

> At present, there is a great mass of potential workers available and willing to obtain lucrative employment. In view of this situation, it is important for reasons of public policy to seek a solution that will allow adequate channeling of the aspirations and needs of these persons to obtain a job, without needlessly harming the workers' interest in obtaining the maximum protection available.

The legislature was therefore willing, in appropriate circumstances, to rely on federal law as the sole constraint on employer conduct.

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[1] Labor Certification Process regulations issued by the U.S. Department of Labor ("USDOL") under the INA and the Wagner-Peyser Act require certain minimal benefit, wage, and working condition provisions to be included in all job offers transmitted through the ICS. 20 C.F.R. §655.202 (1978). These federally mandated minimum conditions become the terms of the "contract" between the employer and the worker.

Immediately following the effective date of this amendment, then-Labor Secretary Quiros announced his intention to exempt from the contract requirements of P.L. 87 those apple growers whose 1978 job offers met federal requirements and were transmitted through the ICS. USDOL promptly cleared 2318 job offers to Puerto Rico. Over 1000 workers were recruited by the week of August 14, 1978, and more than enough workers were subsequently recruited before the start of the harvest season to fill the total number of job offers received. Complaint, pars. 63 and 64.

Faced with the prospect that a large number of Puerto Rican workers would be referred to jobs in the apple harvest and with the corollary prospect that fewer Jamaican workers could be imported, growers and grower associations from Virginia, New York, Maryland and West Virginia filed an action in the U.S. District Court for the Western District of Virginia seeking to have the Puerto Rican workers once more declared "unavailable." *Frederick County Fruit Growers Association, Inc., et al.* v. *F. Ray Marshall, et al.*, No. 78-0086(H) (W.D. Va., complaint filed August 31, 1978), *appeals dismissed and remanded* 594 F.2d 857 (4th Cir. 1979) (unpublished), *dismissed as moot* (W.D. Va., June 16, 1980) (unpublished). Although satisfied that Puerto Rican workers were "available" within the meaning of the INA, the district court (Turk, Ch. J.) nevertheless granted an injunction forcing the issuance of nonimmigrant visas for alien laborers in the full number requested by the grower plaintiffs.

Puerto Rican workers thereafter arriving at the orchard gates suffered refusals to hire and early dismissals on a massive scale. Only 992 of the 2318 workers recruited even arrived on the mainland. The

flights of the remainder were cancelled because growers were refusing to hire those who had already arrived. Fewer than 30 Puerto Ricans remained employed by Virginia orchards three weeks into the harvest season. Complaint, pars. 64. 66, 67 and 69.

The Commonwealth, confronted again with widespread and concerted resistance to the employment of its citizens, filed the instant action for declaratory and injunctive relief on January 11, 1979, in the U.S. District Court for the Western District of Virginia. On the following day, January 12, 1979, a companion action was instituted against 55 apple industry defendants in the U.S. District Court for the Southern District of New York. *Commonwealth of Puerto Rico ex rel. Carlos S. Quiros* v. *Louis Bramkamp, et al.*, No. 79 Civ. 0199 (KTD). Identical motions to dismiss were filed by the defendant growers in both actions.

On April 19, 1979, Chief Judge James Turk of the Western District of Virginia — who had earlier mandated the entry of additional Jamaican workers for the 1978 apple harvest — dismissed the Commonwealth's complaint for want of *parens patriae* standing. The court held that because the 1978 harvest jobs were temporary and because direct harm from defendants' conduct befell less than a substantial majority of the Commonwealth's citizens, the resulting injury to the Commonwealth was neither severe nor generalized enough to permit the Commonwealth to take up the cause. 469 F.Supp. 928, 934 (W.D.Va. 1979). Five months later, Judge Kevin T. Duffy of the U.S. District Court for the Sourthern District of New York, in a one-sentence memorandum endorsement, dismissed the Commonwealth's complaint in the companion *Bramkamp* case "for reasons stated in the decision of

Judge James Turk." The Commonwealth's appeal from this decision was docketed as No. 79-7777 and was argued on February 4, 1981, before the U.S. Court of Appeals for the Second Circuit (Circuit Judges Feinberg and Newman, and Senior District Judge Mishler).

On October 9, 1980, the U.S. Court of Appeals for the Fourth Circuit reversed the district court and held that the Commonwealth possesses standing to maintain this action as *parens patriae*. 632 F.2d 365 (4th Cir. 1980). The growers' petition for rehearing and suggestion of rehearing *en banc* was denied December 16, 1980, and their motion for stay of mandate pending application to this Court for a writ of certiorari was denied December 29, 1980. On January 26, 1981, the Chief Justice denied the growers' application for stay of mandate filed in this Court on January 23, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

I. There Is Presently No Conflict Among The Circuits.

Petitioners are technically correct in stating that the decision of the Fourth Circuit which they seek to have reviewed in this Court conflicts with the decision of Judge Duffy of the Southern District of New York. The actual conflict, however, was between the district court in Harrisonburg, Virginia and the Court of Appeals in Richmond, Virginia. The Virginia district court produced a written opinion of eight pages, and the Court of Appeals reversed the district court in a written opinion of seven pages. The decision of the district court in New York, upon which petitioners rely for a conflict, was accompanied by a one-sentence opinion relying on the opinion of the Virginia district court and containing no new or additional thoughts on the issue of

parens patriae standing. Moreover, while petitioners suggest the possibility of an affirmance by the Second Circuit as grounds for granting the writ, petitioners advance no reason to believe such an affirmance is likely. Their suggestion is thus, at its very best, premature.

II. The Decision Below Is In Full Accord with Prior Decisions Of This Court.

Petitioners argue that the decision of the Fourth Circuit is "in conflict" with prior decisions of this Court. But a conflict does not arise merely because a lower court has applied the principles of prior Supreme Court decisions to a new and different set of facts. Petitioners have shown no direct and irreconciliable conflict with prior decisions of this Court sufficient to support a grant of certiorari. They are merely arguing that the decision below was erroneous, and their argument rests on a persistent mischaracterization of the nature of this action.

In support of the alleged conflict, petitioners urge the Court to read the Fourth Circuit's opinion as one allowing the Commonwealth to sue East Coast apple growers for breaching their contracts with Puerto Rican workers even if only one worker's contract was breached and regardless of the ability of that worker to sue for full relief. Petition, pp. 11-15. If the Fourth Circuit had so held, Respondent would admit the decison to be questionable. But the Fourth Circuit did not so hold.

The Commonwealth's complaint alleged that by refusing to hire Puerto Rican workers, by terminating Puerto Rican workers on various pretexts, and by subjecting Puerto Rican workers to working conditions less favorable than those provided to Jamaican workers,

the defendant apple growers have caused and continue to cause irreparable injury to the Commonwealth by frustrating its efforts to participate in the federal employment system as a labor supply state, hindering the Commonwealth Secretary of Labor in the performance of his statutory charge to further the interests and promote the opportunities of Puerto Rican laborers,[2] and depriving the Commonwealth's citizens of rights and benefits guaranteed them by federal law. The complaint alleged specific examples of unlawful acts against each of the defendant growers.

The Fourth Circuit, in finding these allegations sufficient to support *parens patriae* standing, honored the accepted rule that on a motion to dismiss under Fed.R.Civ.P. 12(b) a court must accept as true all material allegations of the complaint, and must draw therefrom all reasonable inferences in favor of the plaintiff. *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Jenkins* v. *McKeithen*, 395 U.S. 411, 421-422 (1969). The court thus necessarily rejected the narrow characterization of this suit which petitioners successfully urged on the district court, *i.e.*, a simple action for breach of contract in which the Commonwealth undertook to prosecute, as a volunteer, the personal claims of its citizens. The Fourth Circuit correctly recognized that such a characterization cannot stand here, where the complaint alleges unlawful acts broadly directed toward Puerto Rican workers as a whole, and the requested relief will accrue not to ascertainable persons but to a broad, presently indefinable portion of the Puerto Rican citizenry.

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[2] 3 L.P.R.A. §§305, 306 (1965); 29 L.P.R.A. §529 (1966), as amended July 13, 1978.

This Court's prior decisions have firmly established that a state asserting *parens patriae* standing must assert a quasi-sovereign interest, an interest "apart from that of particular individuals who may be affected,"[3] "the gravamen of which runs far beyond the claim of damage to individuals,"[4] 'independent of and behind the titles of its citizens."[5] The complaint must assert "a matter of grave public concern in which the State, as the representative of the public, has an interest apart from that of the individuals affected." *Pennsylvania* v. *West Virginia*. 262 U.S. 553, 592 (1923).[6] The Court of Appeals applied this established principle to find that the Commonwealth asserts a justiciable quasi-sovereign interest in this action.

Alleged injuries to a state's general economy, which in substance implicate the state's interest in economic supervision, have been consistently recognized as conferring standing to sue as *parens patriae*. *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). In *Georgia* v. *Pennsylvania R. Co.*, Georgia was permitted to invoke the original jurisdiction of the Court in a suit to outlaw discriminatory freight rates constituting "an invidious discrimination against a region or locality," 324 U.S. at 462, although individual shippers were most directly

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[3] *Georgia* v. *Pennsylvania R. Co.*, 325 U.S. 439, 451 (1945).

[4] *Id.*, at 452.

[5] *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

[6] *See also Commonwealth of Pennsylvania* v. *Kleppe*, 533 F.2d 668, 674 (D.C. Cir. 1976) (controversy must in substance implicate state's interest in economic supervision); *Kelley* v. *Carr*, 442 F.Supp. 346, 356 (W.D. Mich. 1977) (inherent in concept of quasi-sovereign interest is protection of the public interest).

affected by the discriminatory rates and were capable of prosecuting their own actions. The Court of Appeals correctly perceived that the discriminatory barriers against employment of Puerto Ricans alleged to have been erected by the defendant growers in this action are analogous, in their crippling effect on the Puerto Rican economy, to the discriminatory rates alleged in the *Pennsylvania Railroad* case.

Petitioners urge as error the Fourth Circuit's consideration of indirect and future harm to the Commonwealth, beyond "the relatively small number of Puerto Rican workers involved in the 1978 Virginia apple harvest." Petition, p. 12. But the Fourth Circuit correctly observed that a substantial number of the sovereign's citizens need not be directly injured:

> There has never been cast a hard and fast game of numbers. . . . It is the magnitude and pervasiveness of the societal harm which must be weighed — not the directness of the injury to particular individuals.

632 F.2d at 370. (Footnote omitted.) The Court of Appeals faithfully applied the principles of this Court's decisions to the case before it. It is petitioners who urge a departure from those principles.

III. This Case Is Not One Of First Impression.

Petitioners would have the Court review the Fourth Circuit's decision because "this would be the first case to raise the issue [of *parens patriae* standing] in the context of alleged employment discrimination and contractual violations." Petition, p. 15. But every case which comes before a court involves application of legal principles to a new set of facts. The general principles of law enunciated by this Court are not limited in applicability to the factual matters out of which they

arise. It would be extraordinary to learn, for instance, that the observations of Mr. Justice Holmes in *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, apply only when a state is injured by noxious gases transported over its border by the wind.

Recognition of harm to the general economy of a state as an injury to the state's quasi-sovereign interests is not new. This is not the first case in which harmful conduct is alleged to be directed toward the citizens of a particular state or region, *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, nor is it the first case to recognize a state's interest in protecting and enhancing the welfare of its citizens by securing to them rights guaranteed by federal law. *See, e.g., New York* v. *United States*, 65 F.Supp. 856, 872 (N.D.N.Y. 1946), *aff'd* 331 U.S. 284. Each decision on *parens patriae* standing hinges on analysis of the peculiar facts of the case, whether set forth in the allegations of a complaint, as here, or whether developed during the course of trial. The Fourth Circuit correctly applied recognized principles of the *parens patriae* doctrine to the particular circumstances of this case.

CONCLUSION

For the reasons set forth above, the Court should deny the requested writ.

Respectfully submitted,

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